No. 83-663

Office-Supreme Court, U.S.
FILED
OCT 19 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK; and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
Two World Trade Center
New York, New York 10047
(212) 488-4940

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

GEORGE D. ZUCKERMAN
Deputy Solicitor General

JUDITH A. GORDON
BARRIE L. GOLDSTEIN
Assistant Attorneys General
Of Counsel

Questions Presented

1. Should a federal court in a preliminary injunction proceeding consider a state forum's availability to provide an adequate remedy at law?

2. Does a private party, seeking a federal preliminary injunction against a state or its officer and alleging only nominal money loss, suffer irreparable injury because the Eleventh Amendment bars recovery of this damage if he ultimately prevails?

Parties

The caption includes the names of the parties in the court that issued the judgment sought to be reviewed with one exception. James L. Larocca, as Commissioner of the Department of Transportation of the State of New York, has been substituted for William Hennessey, sued in the same capacity, a defendant-appellant below. Former Commissioner Hennessey resigned his office on December 13, 1982. Commissioner Larocca was appointed as Acting Commissioner on March 10, 1983 and confirmed as Commissioner by the New York State Senate on April 26, 1983.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Parties	1
Table of Authorities	v
Opinions and Orders	2
Jurisdiction	2
Statute Involved	3
Statement of the Case	3
A. Proceedings in the District Court	3
B. The Decision of the Court of Appeals	7
Reasons for Granting the Writ	9
A. The Court Of Appeals' Holding That Federal Courts May Not Inspect The Adequacy Of State Court Remedies Is Inconsistent With Principles Of Federalism Which This Court Has Recognized Since Its Earliest Days	10
B. The Court Of Appeals Erred In Holding That The Existence Of A Jurisdictional Bar Creates An Inadequate Remedy	13
C. The Court Of Appeals Erred In Creating A New Standard Of Irreparable Injury For Litigation In Which Sovereign Immunity Bars Relief At Law	14
Conclusion	17

PAGE

Appendices

Appendix A—May 26, 1983 Opinion of the Court of Appeals 1a

Appendix B—November 29, 1982 Order of the District Court 7a

Appendix C—October 14, 1982 Memorandum Decision and Order of the District Court 9a

Appendix D—October 7, 1982 Order of the District Court 31a

Appendix E—May 26, 1983 Judgment of the Court of Appeals 33a

Appendix F—July 21, 1983 Order of the Court of Appeals 35a

Appendix G—Article 15 of the State Transportation Law 37a

TABLE OF AUTHORITIES

PAGE

Cases:

Atlas Life Ins. Co. v. Southern, 306 U.S. 563 (1939) ... 10, 14
Automated Ticket Systems, Ltd. v. Quinn, 70 App. Div. 2d 726, 416 N.Y.S. 2d 864 (3d Dept. 1979), *aff'd as modified*, 49 N.Y. 2d 792, 426 N.Y.S. 2d 731, 403 N.E. 2d 451 (1980) ... 7

Beacon Theaters v. Westover, 359 U.S. 500 (1959) ... 14
Burford v. Sun Oil Co., 319 U.S. 315 (1943) ... 12

Coalition of Michigan Nursing Homes v. Dempsey, 537 F. Supp. 451 (E.D. Mich. 1982) ... 11

DiGiovanni v. Camden Insurance Ass'n., 296 U.S. 64 (1935) ... *passim*

Edelman v. Jordan, 415 U.S. 651 (1974) ... 9, 15
Ex Parte Young, 209 U.S. 123 (1908) ... 9, 15

Fair Assessment In Real Estate Ass'n. v. McNary, 454 U.S. 100 (1981) ... 10

Graham v. Schweiker, 545 F. Supp. 625 (S.D. Fla. 1982) ... 15
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) ... 12

Hurley v. Kincaid, 285 U.S. 95 (1932) ... 15

Keystone Associates v. New York, 39 App. Div. 2d 176, 333 N.Y.S. 2d 27 (3d Dept. 1972), *aff'd on opinion below*, 33 N.Y. 2d 848, 352 N.Y.S. 2d 194 (1973) ... 7

McCauley v. Kellogg, 15 F. Cas. 1261 (C.C. La. 1874) 14
Massachusetts State Grange v. Benton, 272 U.S. 525 (1926) ... 12
Mathews v. Rodgers, 284 U.S. 521 (1932) ... 10

PAGE

National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Calif. 1976) 5

Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974) 10, 11

Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868) 11
Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 16
Petroleum Exploration, Inc. v. Commissioner, 304 U.S. 209 (1938) ..... *passim*
Phillips v. Marsh, 687 F.2d 620 (2d Cir. 1982) 15
Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967) 10, 14

Quern v. Jordan, 440 U.S. 332 (1979) 9

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 12
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 12

Sampson v. Murray, 415 U.S. 61 (1974) 15
Santa Monica Airport Ass'n. v. City of Santa Monica, 481 F. Supp. 927 (C.D. Calif. 1976), *aff'd*, 659 F.2d 100 (9th Cir. 1981) 5
Scott v. Neely, 140 U.S. 106 (1891) 11
Smyth v. Ames, 169 U.S. 466 (1898) 11
Sperry Int'l. Trade v. Israel, 670 F.2d 8 (2d Cir. 1982) 15
Stratton v. St. Louis Southwestern Railroad Co., 284 U.S. 530 (1932) 11

Tully v. Griffin, 429 U.S. 68 (1976) 12

United States v. State of New York, 708 F.2d 92 (2d Cir. 1983) 2
United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982) 2

PAGE

White v. Sparkill Realty Corp., 280 U.S. 500 (1930) 13

Younger v. Harris, 401 U.S. 37 (1971) 12

Statutes:

Johnson Act, 28 U.S.C. § 1342 (1948) 8, 12

Judiciary Act of 1789, 1 Stat. 82

Section 16 10

Judicial Code, 36 Stat. 1163 (1911)

Section 267 ..... 10, 13

New York Court of Claims Act, 29A (Part 2) McKinney's Consolidated Laws, N.Y. JUDICIARY LAW (Supp. 1981-1982)

Section 8 7

Section 9(2) 7

New York Transportation Law, 61A McKinney's Consolidated Laws, N.Y. TRANSP. LAW §§ 400, *et seq.* (Supp. 1982-1983)

Section 402(3) 3

Tax Injunction Act, 28 U.S.C. § 1341 (1948) 8, 12

28 U.S.C. § 384 (1935) 10

28 U.S.C. § 1254(1) (1948) 2

Miscellaneous:

1 POMEROY'S EQUITY JURISPRUDENCE § 293 (5th ed. 1941) 11

49 HARV. L. REV. 950 (1936) 14

14 TEX. L. REV. 554 (1935-1936) 14

No.

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF NEW YORK; and JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent,

and

BEECHCRAFT EAST, INC.,

Respondent.

JAMES L. LAROCCA, as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

against

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions and Orders

The May 26, 1983 opinion of the United States Court of Appeals for the Second Circuit, affirming the denial by the United States District Court for the Northern District of New York of petitioners' motion to vacate an October 1, 1982 preliminary injunction in favor of respondent Beechcraft East, Inc., is reported at 708 F.2d 92. It is reproduced as Appendix A to this petition.

The district court entered a November 29, 1982 written order without opinion, denying petitioners' motion to vacate the October 1 preliminary injunction. The November 29 order is not reported and is reproduced as Appendix B to this petition. An October 14, 1982 district court memorandum decision and order in support of the October 1 preliminary injunction is reported at 552 F. Supp. 255. It is reproduced as Appendix C to this petition. An October 7, 1982 district court order, confirming the October 1 preliminary injunction, is not reported. It is reproduced as Appendix D to this petition. The October 1 preliminary injunction, restraining a New York statute prohibiting nighttime flight operations at State-owned Republic Airport, was issued orally by the district court and is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was filed on May 26, 1983. It is reproduced as Appendix E to this petition. The order of the court of appeals, denying petitioners' petition for rehearing and suggestion for rehearing *in banc*, was filed on July 21, 1983. It is reproduced as Appendix F to this petition.

This Court has jurisdiction to review the May 26, 1983 judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1948). Petitioners suggest that the Court dispose of this case by summary reversal of the court of appeals' judgment.

Statute Involved

The questions presented ask whether the federal courts, in ruling on preliminary injunction motions, should consider the remedies available in state courts and whether the Eleventh Amendment, precluding movants from obtaining money damages in the federal courts, eases the injunction standard by permitting movants to demonstrate irreparable harm with a showing limited to alleged nominal money loss. The preliminary injunction from which these questions arise restrained the continued implementation of Section 402(3) of the New York Transportation Law. 61A McKinney's Consolidated Laws, N.Y. TRANSP. LAW §§ 400, *et seq.* (Supp. 1982-1983). The Section prohibits flight operations at Republic Airport from 11:00 p.m. to 7:00 a.m. daily except in case of emergency, and became effective on September 19, 1982. It is included in Article 15 of the Transportation Law entitled "Air Transportation Facilities And Services At Stewart and Republic Airports". Article 15 was enacted by L. 1982, ch. 370, § 1, and is reproduced as Appendix G.

Statement of the Case

A. Proceedings in the District Court.

Respondent the United States of America, on behalf of the Federal Aviation Administration, commenced this action against New York and the Commissioner of its Department of Transportation in the United States District Court for the Northern District of New York on September 17, 1982. The United States' complaint alleged, *inter alia*, that the statutory nighttime curfew at State-owned Republic Airport ("Republic") breached certain federal grant agreements and violated the Supremacy Clause and the Impairment of Contract Clause of the United States Consti-

tution. A declaratory judgment and a permanent injunction against the curfew were sought. On September 22, respondent Beechcraft East, Inc. ("Beechcraft"), a fixed based operator providing support services for Republic's users, moved to intervene. Beechcraft alleged essentially the same claims as the United States.* On September 24, the third respondent, the Aircraft Owners and Pilots Association, also alleging claims similar to those of the United States, commenced a separate action which was later consolidated with this action. Only Beechcraft moved for preliminary injunctive relief, and its motion was heard before the district court on October 1, 1982.

In support of its preliminary injunction motion, Beechcraft relied on two brief affidavits, one from its attorney, which generally described its legal position, and the other from its General Manager, Allen K. Pepin, which consisted largely of conclusory allegations and speculation. According to Mr. Pepin, Beechcraft would suffer irreparable injury if the nighttime curfew were not enjoined because its customers based at Republic might leave for other airports. Affidavit of Allen K. Pepin, sworn to on September 20, 1982 ("Pepin Aff."), at 2, ¶ 4 and 3-4, ¶ 7. Mr. Pepin sought to demonstrate the intentions of Beechcraft's customers by twenty-five customer letters annexed to his affidavit. The United States submitted a memorandum of law in support of Beechcraft's likelihood of success on the merits but declined to address Beechcraft's alleged harm, stating that it was "not in a position to know of, and therefore, comment upon Beechcraft's factual allegations of possible irrepa-

* Beechcraft's complaint incorporated the entirety of the United States' complaint by reference. *See* Complaint In Support of Motion of Beechcraft East, Inc. For Leave To Intervene at 2, ¶ 2. It also appeared to plead a contract cause of action, distinct from the United States, based on a License Agreement, dated October 1, 1982, between it and Republic's prior owner, the Metropolitan Transportation Authority (the "MTA"). *Id.* at 3, ¶ 8.

rable injury.'"* Plaintiff's Response To Motion Of Beechcraft East, Inc. To Intervene And For A Preliminary Injunction at 2.

The State challenged Beechcraft's allegations of irreparable injury as legally insufficient since they consisted entirely of minimal money loss. For example, the State showed that Beechcraft's primary function of servicing Republic's users would not be affected since only 2.6 percent of Republic's flight operations occurred during the nighttime hours of the curfew. Affidavit of Clarence Cook, sworn to on September 30, 1982, at 17, ¶ 27. The State also argued that the statements of Beechcraft's General Manager about the loss of customers were not probative since they were based upon twenty-five equivocal and unreliable letters. *Id.* at 18, ¶ 29. *See* Defendants' Memorandum of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction at 40 & n.*.

On October 1, 1982, the district court awarded Beechcraft a preliminary injunction, finding that "Beechcraft has suffered irreparable injury, and the plaintiffs, now Beechcraft and the United States [sic] have a likelihood of success on the merits. . . ." Transcript of the Proceedings on October 1, 1982 at 23. In support of the finding of irreparable injury, the court, relying on the customer letters, first said that Beechcraft's alleged loss was " 'not remote or speculative, but [is] actual and imminent' ". App. C at 22a.**

* The United States' memorandum did not address Beechcraft's claims under federal grant agreements for Republic's development between the United States and the MTA. On appeal, the United States conceded that Beechcraft was not a third-party beneficiary of the agreements. Brief of Plaintiff-Appellee United States of America at 30. *See Santa Monica Airport Ass'n.* v. *City of Santa Monica*, 481 F. Supp. 927, 946 (C.D. Calif. 1976), *aff'd*, 659 F.2d 100 (9th Cir. 1981) and *National Aviation* v. *City of Hayward*, 418 F. Supp. 417, 419 (N.D. Calif. 1976).

** References preceded by "App." identify the lettered appendix and page(s) of the appendices to this petition.

Then, citing the Eleventh Amendment's foreclosure of Beechcraft's recovery of damages (*id.*), the district court said that Beechcraft did not have an adequate remedy at law and that "therefore, the fact that the loss may be only a small percentage of [its] nationwide and international revenue is irrelevant." *Id.*

Given that nominal money loss traditionally is insufficient to support a finding of irreparable injury and that the district court's description of the amount of damage it believed Beechcraft would suffer was equivocal, the State examined Mr. Pepin by deposition to ascertain the dimension of Beechcraft's loss. The State learned that Beechcraft had a total of 200-230 customers who parked their planes at Beechcraft's facilities and who used Beechcraft's services. Transcript of Deposition of Allen K. Pepin, dated October 25, 1982 ("Pepin Tr."), at 2B. The business from these customers, which Beechcraft claimed it would lose without an injunction, had accounted for a maximum of $300,000 of the $21 million of sales revenue realized by Beechcraft in 1981, its last fiscal year for which complete data then was available.* *Id.* at 28 and 10A. Indeed, the $300,000 figure —approximately one percent of the total $21 million of sales revenue—overstated the potential injury which Beechcraft allegedly had demonstrated to the court on its preliminary injunction motion. As Beechcraft then allegedly had shown and as the court had found, Beechcraft might lose some customers if the nighttime curfew were not enjoined, not lose all. Pepin Aff. at 3-4, ¶ 7.

* Mr. Pepin testified that Beechcraft, whose ultimate parent is the Raytheon Company (Pepin Tr. at 14-17), has a diversified business at Republic. It is a franchisee of Beech Aircraft-Raytheon (*id.* at 19) and sells airplanes manufactured by this company. *Id.* at 18. This portion of its business accounted, by far, for the largest percentage of its revenues in 1981—roughly $16 million. *Id.* at 30. As a fixed based operator, Beechcraft maintains a "line service" (*id.* at 13), leasing plane parking space to aircraft users (*id.* at 34) and selling fuel and oil to these customers as well as transient users. *Id.* at 27. Beechcraft also maintains full service, parts and avionics departments (*id.* at 21) and charters aircraft. *Id.* at 26.

With this further proof of Beechcraft's nominal money loss, the State moved to vacate the preliminary injunction, contending that Beechcraft's alleged damage could not constitute irreparable harm. The State additionally argued that the district court had overlooked the availability of the State Court of Claims as a tribunal in which Beechcraft could seek recovery of its alleged damages.* The court denied the motion and limited its remarks to a finding that the State Court of Claims did not have jurisdiction to entertain a Beechcraft action at law and that the alleged unavailability of this state forum made the extent of Beechcraft's damage irrelevant. Transcript of the Proceedings on November 19, 1982 at 18. The State then appealed the denial of its vacatur motion.

B. The Decision of the Court of Appeals.

The court of appeals (*Oakes, Cardamone* and *Winter*, JJ.) affirmed the denials of petitioners' motion to vacate, holding that "Beechcraft's injury was irreparable even though Beechcraft's losses were only pecuniary because a suit in federal court against New York to recover the dam-

* In Section 8 of the New York Court of Claims Act, the State waives its sovereign immunity in accordance with the limitations of Section 9(2) of the Act. Section 9(2) permits claims against the State for breach of contract, appropriation of property and the commission of torts. Both sections are codified in 29A (Part 2) McKinney's Consolidated Laws, N.Y. JUDICIARY LAW §§ 8 and 9 (Supp. 1981-1982). The State argued below that the enactment of the curfew was a proprietary act over which the Court of Claims had jurisdiction either as an alleged breach of Beechcraft's License Agreement or as an alleged *de facto* appropriation of property. *See Automated Ticket Systems, Ltd.* v. *Quinn*, 70 App. Div. 2d 726, 416 N.Y.S. 2d 864 (3d Dept. 1979), *aff'd as modified*, 49 N.Y. 2d 792, 426 N.Y.S. 2d 731, 403 N.E. 2d 451 (1980); and *Keystone Associates* v. *New York*, 39 App. Div. 2d 176, 333 N.Y.S. 2d 27 (3d Dept. 1972), *aff'd on opinion below*, 33 N.Y. 2d 848, 352 N.Y.S. 2d 194 (1973). The district court accepted that "the enactment of the curfew was an act of a proprietor" (App. C at 27a) in its October 14 memorandum decision and order, but later held that the State Court of Claims did not have jurisdiction over this proprietary act on the vacatur motion. (App. B at 8a).

ages sustained by Beechcraft would be barred by the Eleventh Amendment." App. A at 3a. Two grounds were advanced in support of its irreparable injury holding.

The court of appeals first cited a "well-established rule" that "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies" (Emphasis original), relief foreclosed to Beechcraft by the Eleventh Amendment. *Id.* at 4a. In support of the purported general rule, the court relied on *Petroleum Exploration, Inc.* v. *Commissioner*, 304 U.S. 209, 220-221 (1938), holding that plaintiff's alleged injury was not irreparable regardless of the absence of a remedy at law in a state forum, and *DiGiovanni* v. *Camden Insurance Ass'n.*, 296 U.S. 64, 69-70 (1935), holding that plaintiff's inability to satisfy the jurisdictional amount then required to maintain an action at law in the federal court did not cause it to have an inadequate remedy. *Id.* It also relied upon two statutes, the Tax Injunction Act, 28 U.S.C. § 1341 (1948) and the Johnson Act, 28 U.S.C. § 1342 (1948), both requiring federal courts to deny equitable relief if state court remedies are "plain, speedy and efficient", which it regarded as illustrative of "narrow and specific" legislative exceptions of the "well-established rule". *Id.* Consonant with the restrictions it imposed on the federal courts to limit their inquiries to available federal remedies, the court considered the legal remedies available to Beechcraft in the State Court of Claims to be irrelevant and did not reach the district court's finding that the Court of Claims would not have jurisdiction.

Turning to its second Eleventh Amendment ground, the court of appeals held that Beechcraft suffered "absolute" irreparable injury because "Beechcraft's federal damages against New York are constitutionally foreclosed". *Id.* The State's argument that a new and less restrictive ir-

reparable injury standard would be established if Beechcraft were permitted to obtain its injunction against the State or its officer by recourse to the Eleventh Amendment rather than by demonstrating its actual irreparable loss was characterized as depriving federal courts of their equity power any time the Eleventh Amendment bar is present. *Id.* The court then rejected the argument it attributed to the State as inconsistent with *Ex Parte Young*, 209 U.S. 123 (1908), and *Quern* v. *Jordan*, 440 U.S. 332 (1979), both holding that prospective injunctions may be entered against state officers who act under an unconstitutional statute. *Id.* at 5a. The court also dismissed the State's argument, based on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), that an injunction standard, allowing irreparable injury and inadequacy of the remedy at law to rest exclusively on the Eleventh Amendment, is tantamount to a coerced waiver of immunity subjecting states to money actions in federal court. *Id.* The court concluded that the injunction here did not violate the *Edelman* holding because it did not impose compensatory damage costs against the State or its officer. *Id.*

Reasons for Granting the Writ

Fundamental rules of equity and principles of federalism and comity always have compelled federal courts to consider the adequacy of state remedies and to require proof of both irreparable injury and inadequacy of the remedy at law when they consider the award of a preliminary injunction. Refusing to inspect available state remedies and invoking the Eleventh Amendment as the source of both inadequacy of the remedy at law and irreparable injury, the court of appeals allowed Beechcraft a preliminary injunction against New York and its Commissioner of Transportation to which it is not entitled given the nominal money loss it claimed. If left undisturbed and not reviewed now, the decision below instructs the federal courts to

ignore the existence of state tribunals and to merge adequacy of the remedy at law and irreparable injury whenever sovereign immunity restricts the recovery of claimed damages. The decision thus creates a new irreparable injury test which coerces federal and state governments to waive their sovereign immunity to avoid adverse injunction orders. The errors of the court below in this regard are manifest, and its judgment may be summarily reversed without plenary consideration.

A. The Court Of Appeals' Holding That Federal Courts May Not Inspect The Adequacy Of State Court Remedies Is Inconsistent With Principles of Federalism Which This Court Has Recognized Since Its Earliest Days.

It is basic principle of American equity practice, developed under Section 16 of the Judiciary Act of 1789, 1 Stat. 82, that federal courts are precluded from exercising their equity power when a state tribunal provides a "plain, adequate and complete" remedy. *Mathews* v. *Rodgers*, 284 U.S. 521, 525 (1932). Section 16 was intended "to protect the states from the encroachments which would result from the exercise of equity powers by Federal courts failing to observe it."* *Atlas Life Ins. Co.* v. *Southern, Inc.*, 306 U.S. 563, 569 (1939). This Court recently confirmed the principle as stating an "obvious precept". *Fair Assessment In Real Estate Ass'n.* v. *McNary*, 454 U.S. 100, 116 & n.8 (1981). The decision below opposes this fundamental principle by misreading two decisions of this Court and two federal statutes. It also fails to observe the Second Circuit's earlier holding in *Potwora* v. *Dillon*, 386 F.2d 74 (2d Cir.

* The Section was perpetuated without material change in Section 267 of the Judicial Code, 36 Stat. 1163 (1911), 28 U.S.C. § 384 (1935). While Section 267 was repealed in 1948 as obsolete in view of the merger of law and equity accomplished by the Federal Rules of Civil Procedure, 62 Stat. 992, "its principle remains intact." *Oneida Indian Nation* v. *County of Oneida*, 464 F.2d 916, 922 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974).

1967), a point raised on the petition for rehearing in this case. In *Potwora*, Judge Friendly considered and rejected "[p]laintiff's blanket position as to the irrelevancy of state court remedies", *id.* at 77, and proceeded to inquire whether state law there provided an adequate remedy. *See Coalition of Michigan Nursing Homes* v. *Dempsey*, 537 F. Supp. 451, 464 (E.D. Mich. 1982) (holding that plaintiffs challenging Michigan's Medicaid reimbursement scheme had an adequate remedy in Michigan's Court of Claims).

The court of appeals' case law error is apparently attributable to its misunderstanding of a sentence of *dictum* in *DiGiovanni*, 296 U.S. at 69, repeated in *Petroleum Exploration*, 304 U.S. at 217 & n.8, which describes the duty of federal courts to identify the nature of an available state remedy according to federal, not state, standards. This sentence, "[t]he inadequacy prerequisite to relief in a Federal court of equity is measured by the character of remedy afforded in Federal rather than in state courts of law", *id.*, is simply a restatement of an essential concept of federal jurisdiction. *Smyth* v. *Ames*, 169 U.S. 466 (1898). *See* 1 POMEROY'S EQUITY JURISPRUDENCE § 293, at 654 (5th ed. 1941). The concept requires federal courts not to give effect to state law which, by its unique characterization of a remedy, diminishes a federal court's equity power. Instead, a federal court must make its own determination as to whether the state remedy claimed to be available is legal or equitable in its nature. *Stratton* v. *St. Louis Southwestern Railway Co.*, 284 U.S. 530, 534 (1932). The purpose for the concept is twofold—to prevent states from restricting federal court jurisdiction, *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425 (1868), and to preserve a litigant's constitutional entitlement to a jury trial. *Scott* v *Neely*, 140 U.S. 106, 110 (1891). *See, Oneida Indian*, 464 F.2d at 921. The concept has no bearing whatsoever on a federal court's obligation to inspect state remedies.

The court of appeals' erroneous articulation of the "well-established" rule as one precluding inspection of

state remedies caused it to view the Tax Injunction Act, 28 U.S.C. § 1341 (1948), and the Johnson Act, 28 U.S.C. § 1342 (1948), which require federal courts to defer to state remedies when they are "plain, speedy and efficient," as "specific and narrow" exceptions. App. A at 4a. Contrary to the court's reading, these statutes are not exceptions at all. Instead, they refine the correct rule advanced by the State which requires federal courts to inspect state remedies, and they have their "roots in equity practice [and] in principles of federalism. . . ." *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976). They were enacted to restrict further a federal court's exercise of its traditional equity power. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522, 526-527 (1981). Indeed, if the court were correct in its view of those statutes, this Court's instruction that equity cases, decided under Section 16 of the Judiciary Act, may be authoritative in determining whether a state remedy meets the statutory standard of "plain, speedy and efficient", *id.* at 515 & n. 33, could not be followed.

As appears, the decision below undermines the scheme of federalism by denigrating the role of coordinate state courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); *Massachusetts State Grange* v. *Benton*, 272 U.S. 525, 527 (1926) (*Holmes*, J.); *cf. Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971). States are deprived of their sovereign prerogative to create judicial tribunals for the purpose of entertaining actions at law against them and to expect that the courts of the federal government will respect the existence of these tribunals. *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); and *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). Further, the court of appeals' decision invites the choice of federal courts as favored forums. As a result of the holding below, litigants will obtain federal equitable relief on the theory that they are without adequate remedies at law when the state courts in fact provide them with these remedies.

B. The Court Of Appeals Erred In Holding That The Existence Of A Jurisdictional Bar Creates An Inadequate Remedy.

The court of appeals held that Beechcraft had an inadequate remedy at law "because the Eleventh Amendment precludes Beechcraft from suing New York in federal court for any damages [it] suffers." App. A at 3a. This holding is inconsistent with *DiGiovanni*, 296 U.S. at 64, the principal case the court cites for its erroneous holding that federal courts may only look at available federal remedies.

In *DiGiovanni*, the plaintiff insurance company argued, and the court of appeals there held, that it was entitled to equitable relief because it could not meet the federal jurisdictional amount required for it to maintain an action at law in federal district court. *Id.* at 67-68. This Court reversed and held that the insurance company did not have an inadequate remedy merely because it could not meet the requisite federal jurisdictional amount, *id.* at 69-70:

> [W]ant of jurisdictional amount in controversy which deprives a federal court of its authority to act is not ground for invoking its equity powers. The statute [Section 267 of the Judicial Code] forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibitions of Congress. . . .

As a result, the insurance company was left to its legal remedies in state court. *Cf. White* v. *Sparkill Realty Corp.*, 280 U.S. 500, 512 (1930) (dismissing suit in equity and refusing to transfer to law side because no federal question jurisdiction present). To have held otherwise would have improperly "extend[ed] the normal equity jurisdiction of the federal courts. . . ." 49 HARV. L. REV. 950, 951 (1936) (note

on *DiGiovanni*). *Accord,* 14 TEX L. REV. 554, 555 (1935-1936) (note on *DiGiovanni*).

The Eleventh Amendment yields the same result in the case at bar. *McCauley* v. *Kellogg,* 15 F. Cas. 1261, 1263 (C.C. La. 1874) (Eleventh Amendment not causing movant's remedy in federal court to be inadequate). The court of appeals does not discuss the *DiGiovanni* holding or articulate any reason why *DiGiovanni* was not controlling. As it disregards its own earlier holding in *Potwora, supra,* the court now fails to observe its earlier decision in *Oneida Indian, supra,* where *DiGiovanni* was correctly applied. Judge Friendly there stated that "adequacy of the legal remedy is tested by what a federal court could afford if it had jurisdiction, not by what it could do in the particular case." 464 F.2d at 922. In sum, both *DiGiovanni* and *Oneida Indian* required the court below to rule in the State's favor.

C. The Court Of Appeals Erred In Creating A New Standard Of Irreparable Injury For Litigation In Which Sovereign Immunity Bars Relief At Law.

To obtain a preliminary injunction, a movant must demonstrate both "irreparable harm and inadequacy of legal remedies". *Beacon Theaters* v. *Westover,* 359 U.S. 500, 506-507 (1959). "Absence of [a] legal remedy does not dispense with the necessity" of showing irreparable injury. *Atlas Life Ins. Co.,* 306 U.S. at 570. *Petroleum Exploration,* 304 U.S. at 209, cited by the court of appeals as supportive of its holding that federal courts may only look at available federal remedies, highlights this rule. This Court there held that the movant was not entitled to an injunction regardless of the inadequacy of the state remedy because its irrecoverable expense "is not the sort of irreparable injury against which equity protects." [footnote deleted] *Id.* at 221.

The court of appeals ignores the rule and wrongly equates the purported inadequacy of the legal remedy with irreparable injury. Under its decision, the loss of even one dollar establishes irreparable injury if the Eleventh Amendment bars the recovery of that amount of money damage. The court's error also will extend to litigation involving the United States as a defendant, a sovereign having its own immunity against the award of money damages in federal district court. *See, e.g., Hurley* v. *Kincaid,* 285 U.S. 95, 104 (1932); *Graham* v. *Schweiker,* 545 F. Supp. 625, 627-628 (S.D. Fla. 1982) (both holding that plaintiffs had an adequate remedy in the United States Court of Claims even though principles of federal sovereign immunity precluded recovery at law in federal district court); and *Phillips* v. *Marsh,* 687 F.2d 620 (2d Cir. 1982) (denying injunction to West Point cadet because she could recover money damages, presumably in the United States Court of Claims). The decision below does not so burden non-governmental defendants since they may rely upon the doctrine that money damage is not irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61 (1974). *See, e.g., Sperry Int'l. Trade* v. *Israel,* 670 F.2d 8, 12 (2d Cir. 1982). Thus, a new irreparable injury standard, a crucial part of the injunction test, is created in litigation involving sovereign immune governments with a movant merely needing to allege minimal financial loss to satisfy the standard.

The court of appeals' decision mischaracterizes the State's Eleventh Amendment argument on this point. The State did not raise the Eleventh Amendment because it denied, as the court suggests, that a prospective injunction can issue against a state officer where the traditional injunction standard, including irreparable injury, is met. *Ex Parte Young,* 209 U.S. at 129, decided the question, and the State so recognized. Instead, the State, citing *Edelman,* 415 U.S. at 651, raised the Eleventh Amendment to show that the court of appeals' affirmance of the injunction solely

on the basis of the Eleventh Amendment improperly leaves the State with only one choice to avoid the harshness of an injunction—to waive its constitutional immunity and thereby subject itself to money judgments in the federal court. Ignoring this result, the decision below produces exactly the "open-ended" and "potentially burdensome" state obligation which this Court advised would pose "serious questions under the Eleventh Amendment." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 29-30 (1981).

There is a present need for the Court to review the decision below. The decision requires federal courts to apply a new erroneous irreparable injury standard on preliminary injunction motions against the state and federal governments, matters which are litigated constantly in the federal courts. While the State may have a later opportunity to vindicate its position on the merits, mootness will foreclose the claims presented in this petition. If the petition is not now granted, the decision below thus will evade review and the protection sovereign immunity extends to state and federal governments will continue in jeopardy.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Dated: New York, New York
October 19, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
Two World Trade Center
New York, New York 10047
(212) 488-4940

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

GEORGE D. ZUCKERMAN
Deputy Solicitor General

JUDITH A. GORDON
BARRIE L. GOLDSTEIN
Assistant Attorneys General
Of Counsel

APPENDICES

APPENDIX A

May 26, 1983 Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1049—August Term, 1982

(Argued March 21, 1983 Decided May 26, 1983)

Docket No. 82-6343

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

v.

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendants-Appellants.

May 26, 1983 Opinion of the Court of Appeals

Before:

OAKES, CARDAMONE, and WINTER,
Circuit Judges.

Appeal from grant of preliminary injunction by United States District Court for the Northern District of New York, Roger J. Miner, *Judge*. Appellants' argument that a federal court must consider the availability of state court remedies in finding whether movant would suffer irreparable injury without preliminary injunction is rejected and the grant of preliminary injunction is affirmed. Appellants' motion to exclude the United States and the Aircraft Owners and Pilots Association from this appeal is denied.

BARRIE L. GOLDSTEIN, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Deputy Solicitor General, Judith A. Gordon, Assistant Attorney General, of counsel), *for Appellants.*

JAMES J. VON OISTE, Port Jefferson, NY, *for Intervenor-Plaintiff-Appellee Beechcraft East, Inc.*

R. JOHN SIEBERT, Department of Justice, Civil Division (Kenneth N. Weinstein, United States Department of Transportation, Leonard A. Ceruzzi, Richard W. Danforth, Robert F. Eisengrein, Federal Aviation Administration, J. Paul McGrath, Assistant Attorney General, David J. Anderson, Eugene A. Beatty, Department of Justice, Civil Division, of counsel), *for Plaintiff-Appellee United States of America.*

JOHN S. YODICE, Bethesda, MD (Charles J. Peters, Bethesda, MD, Mark L. Heller, of counsel), *for Plaintiff-Appellee Aircraft Owners and Pilots Association.*

May 26, 1983 Opinion of the Court of Appeals

PER CURIAM:

This appeal is taken from an order of the United States District Court for the Northern District of New York, Roger J. Miner, Judge, enjoining the State of New York from imposing a nighttime ban on the use of Republic Airport in Suffolk County, New York. The court below granted plaintiff Beechcraft's motion for preliminary injunction on grounds that New York's curfew was overbroad and arbitrary in violation of the Supremacy Clause of the United States Constitution, and on the ground that Beechcraft would suffer irreparable business damages because the Eleventh Amendment precludes Beechcraft from suing New York in federal court for any damages Beechcraft suffers. We agree.

To be entitled to a preliminary injunction under the test established in *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979) (per curiam), Beechcraft must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief." *Id.* at 72.

New York does not challenge Judge Miner's judgment on Beechcraft's likely success on the merits; this appeal contests only the finding of irreparable harm. Judge Miner found that Beechcraft's injury was irreparable even though Beechcraft's losses were only pecuniary because a suit in federal court against New York to recover the damages sustained by Beechcraft would be barred by the Eleventh Amendment. New York argues that the court

below erred because Beechcraft could have sued New York in the New York Court of Claims. New York's argument, however, simply misses the mark; in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies. *See Petroleum Exploration, Inc. v. Commissioner*, 304 U.S. 209, 217 & n.8 (1938); *DjGiovanni v. Camden Insurance Association*, 296 U.S. 64, 69 (1935). Legislative exceptions to this well-established rule are narrow and specific. *See, e.g.*, 28 U.S.C. § 1342 (Johnson Act, depriving federal district courts of power to enjoin state regulation of public utilities where, inter alia, there is a "plain, speedy and efficient remedy" in state court); 28 U.S.C. § 1341 (Tax Injunction Act, depriving federal courts of power to enjoin the assessment, levy, or collection of any tax under state law when a "plain, speedy and efficient" remedy is available in state court).

New York's arguments against what it calls the "novel proposition" that only federal remedies should have been considered by the court below are answered by a look at the logic of the lower court's decision and at the later fate of the cases on which New York relies. The State argues that the court below eased the necessary showing of irreparable harm in cases seeking injunctive relief against states when in fact the court can only be said to have required an absolute showing of irreparability here because Beechcraft's federal damages against New York are constitutionally foreclosed. New York's insistence that *In re Ayers*, 123 U.S. 443 (1887), deprives the federal courts of the equitable power to enjoin state officials whenever federal

courts lack the legal authority to award damages against them overlooks the Supreme Court's subsequent decision in *Ex Parte Young*, 209 U.S. 123 (1908), which specifically empowered federal courts to enjoin state officials from enforcing allegedly unconstitutional statutes. This holding "undermined the basis of *In re Ayers*." Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's Federal Courts and the Federal System 935 (2d Ed. 1973). New York complains that this view is inconsistent with the Eleventh Amendment protection afforded to states by *Edelman v. Jordan*, 415 U.S. 651 (1974), which invalidates injunctions that impose costs on states that must be regarded as compensatory damages. But the State's argument fails to show how the lower court's injunction will impose such forbidden costs on it; the argument fails as well to acknowledge the Court's decision in the second *Jordan* case, *Quern v. Jordan*, 440 U. S. 332 (1979), which stresses that the federal courts *do* have the power to issue prospective, injunctive relief against state officers who act pursuant to an unconstitutional statute. *Id.* at 346-47. The court below issued just such relief and nothing more. The grant of a preliminary injunction is affirmed.

New York has separately moved that the United States and the Aircraft Owners and Pilots Association (AOPA) be denied participation in this appeal. New York argues that the United States should be forbidden to participate in this appeal because the State and the United States had agreed that the United States would not seek a preliminary injunction in this case if New York would not turn off the nighttime lighting and navigational equipment at Re-

public Airport. The parties disagree entirely as to whether this bargain was ever struck. *Compare* Goldstein Affidavit 10 *with* Seibert Affidavit 5, 7. There is no need for us to resolve this conflict, however, because the terms of the alleged agreement would only prevent the United States from seeking injunctive relief. Beechcraft sought the injunctive relief and the United States is before us in opposition to a motion to *vacate* such relief and not in support of a motion to grant it.

New York also argues that the United States and AOPA should be forbidden to participate because "[s]tanding to appeal requires that a party be aggrieved by a lower court order." But this test need only be applied to New York because the State is apealing the lower court order. Even if this substantial interest test was applicable to appellants [sic], the appellants [sic] here would pass it: the United States seeks to protect its constitutional and statutory supremacy and AOPA has alleged substantial economic injury akin to Beechcraft's. A test that would not include these parties would exclude New York as well. New York's motion is denied.

APPENDIX B

November 29, 1982 Order of the District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

82 Civ. 993 (R.J.M.)

UNITED STATES OF AMERICA,

Plaintiff,

and

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff,

against

THE STATE OF NEW YORK; and WILLIAM HENNESSY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

---

82 Civ. 1023 (R.J.M.)

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff,

against

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant.

The defendants having moved for an Order to vacate this Court's Order of preliminary injunction dated October

7, 1982, or, alternatively setting down a date to conduct an evidentiary hearing, and said motion having regularly come on to be heard on the 19th day of November 1982,

Now, upon reading and filing the notice of motion herein dated November 4, 1982, with proof of due service thereon, the affidavit of Barrie L. Goldstein, Esq., sworn to the 4th day of November 1982, and on the papers submitted upon the motion for the Order, all in support of this motion, and the affidavit of Allen K. Pepin, sworn to the 12th day of November 1982, and on the papers submitted in opposition thereto, and after hearing Barrie L. Goldstein, Esq., attorney for defendants, in support thereof and James J. von Oiste, Esq., attorney for intervenor-plaintiff, BEECHCRAFT EAST, INC., in opposition thereto, and the Court finding that intervenor-plaintiff, BEECHCRAFT EAST, INC., lacks an adequate remedy at law for damages against the defendants in the Court of Claims of the State of New York,

Now, on motion of James J. von Oiste, Esq., attorney for intervenor-plaintiff, BEECHCRAFT EAST, INC., it is

ORDERED, that defendants' motion to vacate this Court's Order of preliminary injunction dated October 7, 1982, or, alternatively setting down a date to conduct an evidentiary hearing is denied.

Dated: November 29, 1982
Albany, New York

/s/ ROGER J. MINER

United States District Judge

APPENDIX C

October 14, 1982 Memorandum Decision and Order of the District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

82-CV-993

UNITED STATES OF AMERICA and BEECHCRAFT EAST, INC.,
Plaintiffs,

against

THE STATE OF NEW YORK and WILLIAM HENNESSEY, As Commissioner of the Department of Transportation of the State of New York,

Defendants.

Appearances:

HON. FREDERICK J. SCULLIN, JR.
United States Attorney
Attorney for Plaintiff United States of America
U.S. Post Office and Courthouse
Albany, New York 12201

Of Counsel:
WILLIAM P. FANCIULLO, ESQ.
Asst. U.S. Attorney

JOHN SEIBERT, ESQ.
Attorney, Dept. of Justice

October 14, 1982 Memorandum Decision and Order of the District Court

JAMES J. von OISTE, ESQ.
Attorney for Plaintiff Beechcraft East, Inc.
505 Main Street
Port Jefferson, New York 11777

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants
Two World Trade Center
New York, New York 10047

Of Counsel:
BARRIE L. GOLDSTEIN, ESQ.
Asst. Attorney General

DAVID B. ROBERTS, ESQ.
Asst. Attorney General

ROGER J. MINER, D.J.

I

In this action plaintiffs, the United States and Beechcraft East, Inc., seek a judgment declaring unconstitutional the statute originally introduced as New York Senate Bill No. 9450-A (S. 9450-A), entitled "AN ACT to amend the transportation law, in relation to air transportation facilities and services at Stewart and Republic airports and making appropriations therefor." Plaintiffs also seek to permanently enjoin defendants, the State of New York and William Hennessey, as Commissioner of the Department of Transportation of the State of New York, from imposing a curfew or turning off runway lights, navigation aids, and landing and take-off aids at Republic Airport, East Farm-

ingdale, New York. The complaint is predicated upon the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, the Noise Control Act of 1972, as amended, 49 U.S.C. § 1431, and the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.*, as well as the Contract Clause of the United States Constitution, U.S. Const. Art I, § 10, and the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2.[1] Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1337 and 1345. Before this Court is plaintiff Beechcraft East, Inc.'s application for a preliminary injunction. Fed. R. Civ. P. 65(a).

II

Republic Airport, located in Suffolk County, Long Island, is a general aviation airport known as a "reliever airport." In this capacity, Republic relieves New York's major commercial airports, John F. Kennedy International Airport, LaGuardia, and Newark, of general (non-commercial) aircraft. It is one of only four airports in the New York City metropolitan area whose primary function is as a reliever airport, capable of accommodating all aircraft types, around the clock, in all weather conditions.[2] In addi-

1. Beechcraft East, Inc.'s motion to intervene in this action pursuant to Fed. R. Civ. P. 24(a) was granted by this Court on October 7, 1982. Beechcraft, in addition to the claims listed above, alleges violation of the Commerce Clause, U.S. Const. Art. I § 8, cl. 3. All of Beechcraft's claims are apparently based upon 42 U.S.C. § 1983. *National Aviation* v. *City of Hayward*, 418 F. Supp. 417, 429 (N.D. Cal. 1976). Jurisdiction is pursuant to 28 U.S.C. §§ 1331 and 1337.

2. The other three reliever airports for general aviation include Teterboro Airport, Teterboro, New Jersey, Morristown Airport, Morristown, New Jersey and the Westchester County Airport, near White Plains, New York.

tion to the importance of Republic Airport as a reliever airport, the Federal Aviation Administration ("FAA"), Eastern Region, bases its aircraft at the airport because of ready availability on short notice.

The Metropolitan Transit Authority ("MTA") is a public benefit corporation created by special act of the New York State Legislature. N.Y. Public Authorities Law § 1260 *et seq.* It has the power to enter into contracts, § 1256(6), and to acquire and hold real property, § 1265(7). The MTA is independent and is not governed by the supervisory powers of the New York State Department of Transportation, § 1268(8). The MTA may be sued, § 1265(1), and held liable in tort for money damages, § 1276.

The MTA was given the authority by the State of New York to own and operate airports in 1965. In 1967, the State authorized, pursuant to the Transportation Capital Facilities Bond Act, the creation of a state debt in the amount of $250,000,000 for the purpose of the acquisition, reconstruction and improvement of airports in the State by public benefit corporations, including the MTA. In March, 1969, the State, by the Transportation Department, for the use of the MTA, purchased 296 acres from the Farmingdale Company for the enlargement of Republic.[3] During the 1970s the State, for the MTA, acquired an additional 144 acres from private owners.

3. Republic Airport originally consisted of about 100 acres and began its life as an airfield used by various aircraft related firms in 1928. In 1965 the airport was open to the public for the first time. Today, Republic is comprised of 535 acres and has two hard-surfaced runways.

October 14, 1982 Memorandum Decision and Order of the District Court

On May 6, 1971, pursuant to the authority of 49 U.S.C. § 1115, the United States conveyed approximately 97 acres to the MTA, thus completing the Republic Airport site. The MTA, in exchange for the conveyance of Republic Airport property, expressly covenanted in the deed of conveyance:

> That all facilities of the Airport developed with Federal Aid and all those useable for landing and taking off of aircraft will be available to the United States at all times, without charge, for use by aircraft of any Agency of the United States in common with other aircraft. . . .

Deed, ¶ 8 (covenant 8). MTA also promised in the deed that "any subsequent transfer of property interests conveyed hereby will be made subject to all of the covenants, conditions and limitations contained in the instrument." Deed, ¶ 5 (covenant 5).

During the past eleven years of MTA's ownership of Republic Airport, the United States, through the Federal Aviation Administration, has made nine grant awards to MTA for acquiring and improving the facilities at Republic. These awards totaled $6,820,782. The improvements have included, *inter alia*, the installation of navigational equipment, runway lighting, improvement of runway markings, and construction of drainage and fencing.

Among the covenants included in the grant agreements are the following:

> (1) . . . not [to] dispose of or encumber its title or other interests of the site and facilities during the

period of federal interest or while the Government holds bonds, whichever is longer. (Assurance No. 10; Affidavit of Clarence Cook, Ex. H);

(2) The sponsor [MTA] will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and Regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. (Assurance No. 32; Affidavit of Clarence Cook, Ex. H);

(3) The Sponsor [MTA] will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport *open to all types,* kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided; That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public. (Assurance No. 18; Affidavit of Clarence Cook, Ex. H) [emphasis added];

(4) The Sponsor [MTA] will operate and maintain in a safe and serviceable condition the Airport and all

facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: Provided, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; And Provided Further, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstances beyond the control of the Sponsor. *In furtherance of this covenant the Sponsor will have in effect at all times arrangements for:*

a. Operating the airport's aeronautical facilities whenever required.

b. Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions, and

c. Promptly notifying airmen of any condition affecting aeronautical use of the Airport. (Assurance No. 22, Affidavit of Clarence Cook, Ex. H) [emphasis added];

(5) All facilities of the Airport developed with Federal aid and all those usable for the landing and taking off of aircraft, *will be available to the United States at all times, without charge, for use by government aircraft in common with other aircraft....* (As-

surance No. 26, Affidavit of Clarence Cook, Ex. H) [emphasis added].

In addition to these general covenants, MTA expressly agreed in the second of the nine grant agreements to operate the lighting systems funded by the grant "throughout each night of the year." (Project No. 8-36-0028-02, Government's Ex. 4).

On June 21, 1982, New York Governor Hugh L. Carey signed into law a bill amending the State's Transportation Law by adding Article 15.[4] The Article's central feature is the transfer from the MTA to the New York Department of Transportation of "all rights, title and interest in all assets, equipment and property . . . used in connection with the ownership, planning, development, maintenance and operation of . . . Republic airport. . . ." Section 400(3)(h). The Commissioner of the Department of Transportation is given the authority to operate Republic and, if he determines it to be "necessary, convenient or desirable", Section 400(3)(b), to enter into a service contract for such operations with the MTA or any other qualified operator, Section 400(3)(h). Until the Commissioner entered into such a contract, the Legislature provided that the MTA, although no longer Republic's owner, should continue to operate the airport for a transitional period not to exceed one year from the effective date of the Article. Section 400(3)(h).

Section 402(1) created the Republic Airport Commission, a citizens' advisory council, to advise the Commissioner. Finally, Article 15, in recognition of noise complaints by

4. Senate Bill S. 9450-A.

inhabitants who live in Republic's vicinity, included a provision, Section 402(3),[5] which imposed a mandatory 11:00 P.M. to 7:00 A.M. curfew at the airport.[6]

5. Section 402(3) provides:

> The arrival or departure of aircraft to or from the airport between the hours of 11 P.M. and 7 A.M., except in the case of emergency, and the development of additional runways at the airport are hereby prohibited, provided, however, that such prohibitions may be altered, modified or changed by resolution adopted by a majority vote of the members of the commission after giving public notice of such alteration, modification or change and holding a public hearing thereon. Any alteration, modification or change which affects the prohibition with respect to arrival and departure of aircraft shall be made only after due consideration has been given to the pe[r]iod of daylight occurring at such airport. Notwithstanding the foregoing provisions of this subdivision, the prohibition against the arrival or departure of aircraft to or from the airport between the hours of 11 P.M. and 7 A.M. shall not become effective until ninety days [September 19, 1982] after the effective date of this subdivision.

6. Defendants allege that Bill S. 9450-A, now Article 15 of the Transportation Law, was eventually passed for three reasons. First, after MTA became Republic's owner in 1969, it experienced substantial operating deficits (for example, $1.4 million in 1979, $2.1 million in 1980, $2.3 million in 1981 and an expected $3.7 million in 1982). Second, the MTA, due to its primary mass transportation function, was unable to devote sufficient time to Republic's operation. Third, Republic's facilities were expected to grow and the Department of Transportation was regarded as a more suitable state agency to foster economic development. (Affidavit of Clarence Cook, ¶ 16). The stated purpose of Article 15 corresponds with the above:

> § 400. Air transportation facilities and services at Stewart and Republic airports. 1. In order to meet present and future state needs with respect to the provision of adequate, safe and efficient air transportation facilities and services to the public, and to promote the economic development and well-being of the state, the planning, development, maintenance and operation of such facilities and services at Stewart and Republic airports may be carried out by the department and the commissioner in accordance with the provisions of this article.

October 14, 1982 Memorandum Decision and Order of the District Court

The Government alleges that, contrary to the deed and grant covenants, neither the MTA nor the State of New York, at any time, obtained the FAA's permission to transfer ownership of the airport from MTA to the State Department of Transportation or to deny Republic's use to the United States or to other aeronautical users between 11:00 P.M. and 7:00 A.M.[7] The Government further alleges that New York's decision to turn off runway lights and navigational aids and to declare Republic closed during curfew hours presents serious safety hazards to those using the airport for emergency night time landings, to those intending to land before 11:00 P.M. but delayed for adverse weather conditions or other reasons, and to those intending to use the lighted airport as a navigational aid while going to or from nearby LaGuardia and JFK airports. However, at a September 15, 1982 meeting between counsels of the FAA and the State, defendants agreed not to turn off runway lighting and navigational aids pending litigation of the issues in this case, in exchange for the Government's promise not to seek a preliminary injunction. Notwithstanding defendants' concession on the issue of lighting and navigational aids, defendants declined to rescind transfer of the airport or imposition of the curfew. As a result, the Government filed the instant action seeking injunctive and declaratory relief.

Beechcraft East, Inc. ("Beechcraft") is a Kansas corporation organized and existing under the laws of the State

7. Defendants allege that they indeed obtained FAA approval, but, at the last moment, the FAA refused to formally acquiesce in the transfer. In any event, the curfew provisions of the legislation went into effect September 20, 1982.

of Kansas and maintains its principal office at Republic Airport, East Farmingdale, New York. On October 1, 1972, Beechcraft and MTA entered into an agreement whereby MTA leased to Beechcraft certain land and facilities at Republic for the purpose of conducting a general aviation facility to provide, among other things, all aviation related services as well as the sale, purchase, rental and lease of aircraft. As a result of that agreement, Beechcraft has expended sums of money in the development of its general aviation facility, purchased properties and equipment necessary to perform its obligations pursuant to the agreement, and has entered into agreements with owners and lessees of aircraft, based at Republic Airport, wherein Beechcraft has agreed to provide twenty-four hour service and flights on demand, as well as cargo transfer and emergency medical flights.

Beechcraft alleges that, as a result of the curfew imposed by the defendants, many of Beechcraft's contract customers gave Beechcraft notice of their intention to relocate to other airports if a curfew is in fact imposed. Beechcraft maintains, moreover, "that as a consequence of the curfew imposed by New York Senate Bill No. 9450-A, Beechcraft East, Inc.'s business has been seriously injured and the very life and continued existence of its business has been put in jeopardy." (Complaint, In Support of Motion for Leave to Intervene, ¶ 13).

October 14, 1982 Memorandum Decision and Order of the District Court

III

In this Court a party seeking a preliminary injunction must make a clear showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sperry International Trade, Inc.* v. *Government of Israel,* 670 F.2d 8, 11 (2d Cir. 1982); *Warner Bros., Inc.* v. *Gay Toys, Inc.,* 658 F.2d 76, 78-79 (2d Cir. 1981). A preliminary injunction is an "extraordinary and drastic remedy which should not be routinely granted" except upon a clear showing that the movant has carried its heavy burden. *Buffalo Forge Co.* v. *Ampco-Pittsburgh Corp.,* 638 F.2d 568, 569 (2d Cir. 1981); *Beech-Nut, Inc.* v. *Warner Lambert Co.,* 480 F.2d 801, 803 (2d Cir. 1973). Moreover, where granting a preliminary injunction would adversely affect the "public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus* v. *United States,* 321 U.S. 414, 440 (1944); *New York Pathological and X-Ray Laboratories, Inc.* v. *Immigration and Naturalization Service,* 523 F.2d 79, 81 (2d Cir. 1975). This Court believes that plaintiff Beechcraft's application for a preliminary injunction should be granted since Beechcraft has met the burden of demonstrating both prongs of this Circuit's preliminary injunction test.

October 14, 1982 Memorandum Decision and Order of the District Court

IV

A. Irreparable Harm

Beechcraft has demonstrated that, as a result of the curfew, its customers are cancelling their agreements with Beechcraft and are "going elsewhere". In this regard, Beechcraft has presented evidence that over twenty-five[8] customers have given Beechcraft notice of their intention to relocate to another airport when the curfew is imposed, and, moreover, that cancellations continue to be received by Beechcraft on an almost daily basis.

Defendants allege that, on an average basis, Republic Airport during 1981 had a total of 527 daily takeoffs and landings and only 14 of these operations—2.6 percent—occurred during the hours of 11:00 P.M. and 7:00 A.M. Therefore, since Beechcraft's business at Republic is to service aircraft using the facility, defendants contend, on the basis of the above statistics, "Beechcraft cannot claim that its viability as a business entity will be irreparably harmed if it is unable to realize revenues from its servicing of the few aircraft which will now be unable to use Republic

8. These customers now include Doubleday Communications Corporation, Aero Direct, Inc.; the New York Islanders; Nassau Flyers, Inc.; Pegasus Aeroservices Inc.; Vanguard Instrument Corporation; Oscar de la Renta, Division of Rich Fin. Inc.; Price-Driscoll Corporation; AOPA New York Members; Assemblyman G. Oliver Koppell; Struthers Electronics Corporation; Action Crane Corp.; Irwin & U.S.; Imperial Jalousie Corp.; Comsteel Products, Inc.; Associated Marketing Systems, Inc.; Mercury Paint Corp.; Aping Specialties Corp.; Precise Optics/PME, Inc., Procyon Corp.; Damin; Compac; Botie Instrument Co., Inc.; AFA, Inc.; and Advantage Food Marketing Corp.

during the hours of the curfew." (Affidavit of Clarence Cook, ¶ 28).

However, defendants have not consulted the appropriate navigational aids supplied by the Second Circuit. That Court recognized, in *Jackson Dairy, Inc.* v. *H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam), that "[a]s to the kind of irreparable harm that the party must show, the language of some past cases has suggested to some a spectrum ranging from possible to probable which is defined as 'not remote or speculative but . . . actual and imminent.' " Yet it is clear that the preferred showing to be made must be beyond "possible irreparable injury" since, "as the great Voltaire once wrote in *Candide*, his most entertaining and perhaps most influential philosophical novel . . . anything is possible in this best of all possible worlds." *Jack Kahn Music Co., Inc.* v. *Baldwin Piano & Organ Company*, 604 F.2d 755, 759 (2d Cir. 1979).

Here, Beechcraft has demonstrated a business loss that is certainly "not remote or speculative, but [is] actual and imminent". *Id.* Over twenty-five customers have given notice that they will terminate their accounts with Beechcraft, and others have in fact transferred their business to other airports. For this loss there is no adequate remedy at law,[9] and, therefore, the fact that the loss may be only a small percentage of Beechcraft's nation-wide and international revenue is irrelevant. There is no requirement in this Circuit that a party wait until near-extinction before

9. The eleventh amendment, of course, precludes Beechcraft from obtaining compensatory damages here. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651 (1974).

moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact.[10]

B. Likelihood of Success on the Merits

Beechcraft contends that the action of the State of New York in imposing a night time curfew at Republic Airport impairs its contract rights in violation of the Contract Clause of the Constitution, Article I, § 10 and impedes interstate commerce in derogation of the Commerce Clause, Article I, § 8, cl. 3. In the alternative, Beechcraft contends that New York's actions violate the Supremacy Clause of the Constitution, Article VI, cl. 2 since, (1) the transfer of the airport and the imposition of a curfew conflicts with federal interests in airport development and aviation safety, and (2) the imposition of a curfew on all aircraft users by a state under its police power authority is otherwise pre-empted by congressional legislation.

As a threshold matter, this Court observes that it is a cardinal principle of American jurisprudence that, given the existence of both constitutional and statutory issues in an action, "[t]he latter ... [is] to be decided first and the former not reached if the statutory claim ... [is] dispositive." *Hagans* v. *Lavine*, 415 U.S. 528, 543 (1974). *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 n. 22 (1976); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Moreover, there is no question that a claim under the Supremacy Clause is considered a statutory issue to be determined before resolution of any constitutional question. *Hagans* v. *Lavine, supra,*

10. To paraphrase Justice Jackson.

415 U.S. at 549; *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

Whether a federal statute pre-empts the otherwise lawful authority of a state to regulate in a specific area is a question of congressional intent. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Therefore, if Congress expressly declares that the authority conferred by it shall be singularly federal, the States may not exercise concomitant or supplementary power over the identical activity. *Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Rice* v. *Santa Fe Elevator Corp., supra.* Even when Congress has failed to speak expressly to the issue of federal exclusivity, an intention to create sole federal authority can be implied. *Fidelity Federal Savings & Loan Assoc.* v. *Reginald D. de la Cuesta*, —— U.S. ——, 102 S. Ct. 3014 (1982). Key factors in this determination include: (1) the pervasiveness of the federal regulation, *Rice* v. *Santa Fe Elevator Corp., supra;* (2) dominance of the federal interest in the field of regulation, and whether non-federal regulation obstructs the full execution of those aims, *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

Beechcraft contends that the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, as it amends the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, and the regulations promulgated thereunder, pre-empt the area of noise regulation and render Article 15 unconstitutional. The leading case on this question is unquestionably *City of Burbank* v.

Lockheed Air Terminal, 411 U.S. 624 (1973). *Burbank* involved a city ordinance which imposed a "curfew" that, in the absence of an emergency, prevented jet aircraft from taking off from privately owned Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. Justice Douglas, writing for a 5-4 majority, after a detailed examination and analysis of the aforementioned statutes, their legislative history, and the interplay of the preemption rationale of *Rice* v. *Santa Fe Elevator Corporation*, *supra*, concluded that the "pervasive nature of the scheme of federal regulation of aircraft noise" constituted preemption. *City of Burbank* v. *Lockheed Air Terminal*, *supra*, 411 U.S. at 633.

However, *Burbank* recognized that Congress singled out airport proprietors and gave them special, although undefined, leeway in controlling the sources of aircraft noise directly. *City of Burbank* v. *Lockheed Air Terminal*, *supra*, 411 U.S. at 635-36 n. 14; *British Airways Board* v. *Port Authority of New York* [*I*], 558 F.2d 75, 83 (2d Cir. 1977).[11] The rationale for this exception is clear: since airport proprietors bear liability for excessive aircraft noise under *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), fairness dictates that they must have power to insulate themselves from that liability. *British Airways Board* v. *Port Authority of New York* [*I*], *supra*, 558 F.2d at 83. *See* 34 Fed. Reg. 18, 355 (1969); S. Rep. No. 1353, 90th Cong., 2d Sess. 7

11. There were two Circuit decisions concerning the British Airways Board and the Port Authority: *British Airways Board* v. *Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) and *British Airways* v. *Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977).

(1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2688, 2693. However, before a political entity, acting as an airport proprietor, may possess the power to abate airport noise, it must bear the responsibility, either actual or potential, for excessive airport noise. Among the bases given in *Griggs* for constitutional liability, or proprietorship for *Burbank* purposes, were the entity's ability to obtain the necessary approach easements, *see British Airways Board* v. *Port Authority of New York* [*II*], 564 F.2d 1002, 1011 (2d Cir. 1977), and its status as promoter, lessor, and operator of the airport. *Griggs* v. *Allegheny County, supra,* 369 U.S. at 89. *See Town of East Haven* v. *Eastern Airlines, Inc.,* 331 F. Supp. 16, 30-32 (D. Conn. 1971). Indeed, several other courts have expressly recognized that municipalities and other political sub-divisions of a state may fall under the so-called *Griggs* exception. *See, e.g., National Aviation* v. *City of Hayward, Cal.,* 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transport Association of America* v. *Crotti,* 389 F. Supp. 58 (N.D. Cal. 1975).

Beechcraft, however, argues that New York was acting under its police power when Article 15 was enacted and not as an airport proprietor, and, therefore, the curfew provisions are a nullity under the *Burbank* rationale. As previously noted, the rationale for the proprietor exemption to imposing curfews is to enable a proprietor to protect himself from liability for excess aircraft noise. Beechcraft contends that, at the time at which the curfew was imposed, New York had never been the proprietor of Republic and had not experienced a prior and continuing commercial interest in avoiding liability. The threat of commercial ruin

from large, adversary monetary judgments underlying the "fairness" rationale for the proprietor exemption was not present when New York took over the airport, it is contended, and New York's action was a purely political act of its Legislature.[12] Therefore, Beechcraft concludes, the *Griggs* exception does not apply to a state or at least to the state acting at bar. *Cf. San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (where the court held that California was not acting as an airport proprietor when its transportation department promulgated curfew hours).

This Court rejects this contention. It is well accepted that a state may act in both a proprietary and a governmental capacity. *United Transportation Union* v. *Long Island Rail Road Co.*, —— U.S. ——, No. 80-1295 (U.S. March 24, 1982); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *United States* v. *California*, 297 U.S. 175 (1936). Here, the State of New York, simultaneously with the transfer of ownership of Republic from MTA to the State, promulgated the curfew in response to local community complaints of noise pollution stemming from Republic. Although the transfer may have been for political and economic reasons and pursuant to legitimate state police power, the enactment of the curfew was an act of a proprietor. By statute, New York has waived its immunity from liability and action and has consented to suit in accordance with the same rules of law as apply to actions in the state Supreme Court against individuals or corporations. N.Y. Court of Claims Act. Therefore, since the State here faces potential liability, the rationale of the *Griggs* exception applies.

12. *See* n. 6, and accompanying text, *supra*.

However, the Second Circuit in *British Airways Board I* held that the scope of an airport proprietor's power "to impose use restrictions based on noise considerations is defined by the limited role Congress reserved for it in the national scheme. . . ." 558 F.2d at 84. The proper bailiwick of the proprietor is the "issu[ance of regulations] or establish[ment of requirements] as to the permissible level of noise which can be created by aircraft using the airport." S. Rep. No. 1353, *supra* at 6, *reprinted in* [1968] U.S. Code Cong. & Admin. News 2694. The State then is vested "only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster." *British Airways Board I, supra*, 558 F.2d at 84. *See also National Aviation* v. *City of Hayward, Cal., supra.*

Here, the Court finds that Article 15's curfew is overbroad, unreasonable and arbitrary. The curfew extends to *all* aircraft, regardless of the *degree* of accompanying emitted noise. In fact, Article 15 makes no reference to noise levels measured in decibels as a factor in particular plane prohibition during the 11:00 P.M. to 7:00 A.M. curfew. Instead, all take-offs and landings are proscribed, except emergency flights, and all aircraft are presumed and deemed intolerable, as a matter of law, to the surrounding communities. Moreover, as the State admits, only 14 flights occur during the forbidden hours—a mere 2.6 percent of the total daily aircraft traffic. A total proscription of flights during the curfew period, it seems to this Court, is unrea-

sonable in view of the sparsity of flights during the curfew hours. Therefore, since the curfew imposed by Article 15 at Republic extends to all aircraft, regardless of decibel level emitted by individual aircraft, and is in any event arbitrary under the circumstances of the low number of flights, the curfew provision of Article 15 is overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight. *British Airways Board, I, supra. See Allegheny Airlines* v. *Village of Cedarhurst,* 238 F.2d 812 (2d Cir. 1956); *see also American Airlines* v. *Town of Hempstead,* 398 F.2d 361 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017 (1969).

In addition, the Supremacy Clause covers not only cases where federal regulation has so pervasively pre-empted an area so as to prohibit state action of a similar character, but also where narrower conflicts between state and federal law exist, even when the subject of the conflict involves an area not otherwise pre-empted by federal regulation. "Even where Congress has not completely displaced state regulation in a specified area, state law is nullified to the extent that it actually conflicts with federal law." *Fidelity Federal Savings & Loan Assoc.* v. *Reginald de la Cuesta, supra,* 102 S. Ct. at 3022. *Gibbons* v. *Odgen,* 9 Wheat 1 [6 L.Ed. 23] (1824). In deciding whether a statute is in conflict with a federal statute or regulation, and ergo invalid, a court must first ascertain the construction of the federal and state statutes and regulations, and then decide the constitutional question of whether they conflict. *Perez* v. *Campbell, supra,* 402 U.S. at 644 (1971).

Here, the federal grant law requires that airports receiving federal funding be made available for use by the

United States at all hours. Federal grants to airport operators are made pursuant to the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.* Among the Act's provisions is a requirement that, as a condition to obtaining federal funding, an airport owner must give assurances, as the MTA (and now New York as MTA's successor in interest) here so covenanted, that "all of the facilities of the airport developed with federal financial assistance and all those usable for landing and takeoff will be available to the United States . . . in common with other aircraft *at all times.*" (emphasis added). 49 U.S.C. § 1718(5). New York's blanket 11:00 P.M. to 7:00 A.M. curfew undeniably conflicts with the congressional mandate that Republic Airport, as a recipient of federal grant money, be open for use by the United States, and private parties, twenty-four hours a day. It is clear then that Article 15's curfew provision, since it conflicts with a federal statute and the will of Congress, is repugnant to the Constitution, and, therefore, a nullity.

V

Accordingly, Beechcraft has sustained its burden with respect to this application. A preliminary injunction order was signed on October 7, 1982.

The foregoing shall constitute the Court's Findings of Fact and Conclusions of Law in support of the order heretofore made, pursuant to Fed. R. Civ. P. 52(a).

It is so Ordered.

Dated: October 14, 1982
Albany, New York

/s/ Roger J. Miner

U.S. District Judge

APPENDIX D

October 7, 1982 Order of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

Present:

HON. ROGER J. MINER,
Judge

Civil Action No. 82-CV-933

UNITED STATES OF AMERICA,

Plaintiff,

against

THE STATE OF NEW YORK and WILLIAM HENNESY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

BEECHCRAFT EAST, INC.,

Plaintiff, Intervenor,

against

THE STATE OF NEW YORK and WILLIAM HENNESY, as Commissioner of the Department of Transportation of the State of New York,

Defendants.

A motion having duly come on to be heard before this Court on October 1, 1982, upon an Order to Show Cause

granted herein by Hon. Roger J. Miner, one of the Judges of this Court, on September 22, 1982 for an Order pursuant to Rule 65(a), Federal Rules of Civil Procedure, enjoining and restraining defendants and anyone acting in concert with them, pending the trial and determination of this action, from imposing a curfew or turning off runway lights, navigation aids and landing and take-off aids at Republic Airport, East Farmingdale, New York, and after reading and filing the said Order to Show Cause, the Complaint of Beechcraft East, Inc., verified September 20, 1982, and the affidavits of James J. von Oiste, Esq., Allen K. Pepin and Alfred T. McDonough sworn to on September 21, 1982, Septemeber [sic] 20, 1982 and September 24, 1982, respectively, with proof of due service thereof, in support of said motion, and the affidavit of Clarence Cook, sworn to on September 28, 1982 in opposition thereto, and having heard the arguments of counsel in open court:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants and anyone acting in concert with them, are hereby enjoined and restrained, pending the trial and determination of this action, from imposing a curfew or turning off runway lights, navigation aids and landing and take-off aids at Republic Airport, East Farmingdale, New York.

Signed this 7th day of October 1982 at Albany, New York.

Enter:

/s/ ROGER J. MINER

ROGER J. MINER
Judge, United States District Court

APPENDIX E

May 26, 1983 Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May[,] one thousand nine hundred and eighty-three.

Present:

HON: JAMES L. OAKES
HON: RICHARD J CARDAMONE
HON: RALPH K. WINTER
Circuit Judges,

82-6343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,
Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK; et al.,
Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,
Plaintiff-Appellee,

v.

WILLIAM HENNESSY, et ano.,
Defendants-Appellants.

May 26, 1983 Judgment of the Court of Appeals

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

FURTHER ORDERED that appellants' motion to exclude the United States of America and the Aircraft Owners and Pilots Association from participation in this appeal be and it hereby is denied.

A. Daniel Fusaro,
Clerk

by: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

APPENDIX F

July 21, 1983 Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

No. 82-6343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

BEECHCRAFT EAST, INC.,
Intervenor-Plaintiff-Appellee,

v.

THE STATE OF NEW YORK, and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,
Defendants-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,
Plaintiff-Appellee,

v.

WILLIAM HENNESSEY, As Commissioner of the Dept. of Transportation of the State of New York,
Defendants-Appellants.

July 21, 1983 Order of the Court of Appeals

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, William Hennessey, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk

by: /s/ VICTORIA C. DALTON
Deputy Clerk

APPENDIX G

Article 15 of the State Transportation Law

STATE OF NEW YORK

S. 9450—A
Cal. No. 867

A. 12404—A

SENATE—ASSEMBLY

April 27, 1982

IN SENATE—Introduced by Sens. SCHERMERHORN, JOHNSON, LEVY, MARCHI, WINIKOW—read twice and ordered printed, and when printed to be committed to the Committee on Transportation—reported favorably from said committee and committed to the Committee on Finance—reported favorably from said committee with amendments, ordered to a third reading and to be reprinted as amended, retaining its place in the order of third reading

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of M. of A. Yevoli, Healey, Halpin, Rettaliata)—read once and referred to the Committee on Corporations, Authorities and Commissions—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the transportation law, in relation to air transportation facilities and services at Stewart and Republic airports and making appropriations therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The transportation law is amended by adding a new article fifteen to read as follows:

Article 15 of the State Transportation Law

ARTICLE 15

Air Transportation Facilities and Services at Stewart and Republic Airports

Section 400. Air transportation facilities and services at Stewart and Republic airports.
401. Stewart airport commission.
402. Republic airport commission.

§ 400. Air transportation facilities and services at Stewart and Republic airports. 1. In order to meet present and future state needs with respect to the provision of adequate, safe and efficient air transportation facilities and services to the public, and to promote the economic development and well-being of the state, the planning, development, maintenance and operation of such facilities and services at Stewart and Republic airports may be carried out by the department and the commissioner in accordance with the provisions of this article.

2. The following terms, as used in this article shall mean:

(a) "Air transportation facilities" shall mean aircraft and developments such as airports, air terminals, runways, hangars, control towers, ramps, taxiways, aprons, wharves, bulkheads, buildings, structures, equipment, parking areas, improvements, facilities and any real property necessary, convenient or desirable for or relating to the landing, taking off, accommodation and servicing of aircraft, or for the loading, unloading, interchange or transfer of passengers, baggage or cargo, or otherwise for the accommodation,

use or convenience of passengers, carriers, crews and employees. It shall also mean facilities providing access to airports or air terminals, including highways, access roads, driveways and appurtenances, devices and structures incidental thereto.

(b) "Air transportation purposes" shall mean the effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance, extension, or operation of air transportation facilities or services owned, leased, operated or provided by the department, or by others pursuant to agreement with the department, at Stewart and/or Republic airports.

(c) "Department" shall mean the department of transportation of the state of New York.

(d) "Commissioner" shall mean the commissioner of transportation of the state of New York.

(e) "Stewart and Republic airports" shall mean those airports, and facilities and surrounding areas under the jurisdiction of the metropolitan transportation authority or any subsidiary public benefit corporation, located at (in the case of Stewart airport) the county of Orange, towns of Newburgh and New Windsor; and (in the case of Republic airport) in the county of Suffolk, town of Babylon.

(f) "Real property" shall mean lands, structures, franchises and interests in land, including air space, air rights, waters, lands under water and riparian rights, and any and all things and rights included within said term, and includes not only fee simple absolute but also any and all lesser interests, including but not limited to easements, rights of

way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms for years and liens thereon by way of judgments, mortgages or otherwise.

(g) "Aircraft" shall mean aircraft of all types, including but not limited to airplanes, airships, dirigibles, helicopters, gliders, seaplanes, or any other contrivance now or hereafter used for the navigation of or flight in air or space.

(h) "Stewart airport commission" shall mean the commission established by section four hundred one of this article.

(i) "Republic airport commission" shall mean the commission established by section four hundred two of this article.

3. In order to effectuate the purposes of this article:

(a) The commissioner, for and on behalf of the people of the state of New York, may acquire any and all air transportation facilities necessary for air transportation purposes, pursuant to the eminent demain procedure law, or by purchase, gift, grant, transfer, assignment, contract, lease or other arrangement.

(b) The department may, on such terms and conditions as the commissioner determines necessary, convenient or desirable, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair air transportation facilities at Stewart and Republic airports, or may provide therefor by contract, lease or otherwise, with any person,

firm, corporation, municipality, or governmental unit, agency or instrumentality. In connection with the operation of any such air terminal, the department may establish, construct, effectuate, operate, renovate, maintain, improve, extend or repair, or may provide therefor by contract, lease or otherwise, any related services or activities the commissioner deems necessary, convenient or desirable.

(c) The department may establish, levy and collect or cause to be established, levied and collected, or join with others in the establishment, levying and collection, of such fares, tolls, rentals, rates, charges and other fees as the commissioner deems necessary, convenient or desirable for the use or operation of any air transportation facilities, services, equipment or activities operated at, serving or incidental to Stewart or Republic airports.

(d) The commissioner may establish such rules, regulations and procedures governing the use, operation and occupancy of air transportation facilities and related facilities, equipment, services and activities at, serving or incidental to Stewart and Republic airports as he may deem necessary, convenient or desirable.

(e) The department may apply for, accept, receive and utilize grants of property, money and services and other assistance offered or made available to it by any person, government or agency or instrumentality thereof for any use within the scope of its functions, powers, duties or responsibilities under this article.

(f) The department may do all things it deems necessary, convenient or desirable to manage, control and direct

the maintenance and operation of air transportation facilities and related facilities, equipment, activities and services, at Stewart and/or Republic airports; provided, however, that the department shall take no action which would be inconsistent with or supersede the provisions of subdivision three of section four hundred two of this article.

(g) The department may conduct or participate in demonstration projects relating to air transportation facilities and services at, serving or incidental to Stewart or Republic airports.

(h) Upon the effective date of this article all rights, title and interest in all assets, equipment and property, both tangible and intangible, used in connection with the ownership, planning, development, maintenance and operation of Stewart and Republic airports of the metropolitan transportation authority and/or any subsidiary corporation of such authority are hereby transferred to the department of transportation. Any and all appropriations or reappropriations made in any capital projects fund or state purposes account to the metropolitan transportation authority in connection with either Stewart and/or Republic airports which remain unencumbered on the effective date of this article are hereby transferred to the department of transportation. The commissioner, subject to the approval of the division of the budget, shall enter into an agreement or agreements with the metropolitan transportation authority and/or any subsidiary corporation of such authority and authorization is hereby granted to the metropolitan transportation authority and/or any subsidiary corporation of such authority to enter into such agreement or agreements to transfer and

assign to the department of transportation any other rights and obligations and contract rights and obligations resulting from or arising out of the ownership, planning, development, maintenance and/or operation of Stewart and/or Republic airports, and notwithstanding the provisions of chapter four hundred seventy-two of the laws of nineteen hundred seventy-one, the metropolitan transportation authority and/or any subsidiary corporation of such authority is authorized to contract with the commissioner to provide service as an airport operator for Stewart and/or Republic airports. In lieu of contracting with the metropolitan transportation authority and/or any subsidiary corporation of such authority for such services, the commissioner may contract for the operation of Stewart and/or Republic airports with any qualified operator. Any service contract shall contain the clause that the term of such contract with respect to either Stewart airport or Republic airport or both shall be subject to cancellation upon six months' notice from the commissioner. Such notice shall be given only after the consultation, guidance, advice and assistance relative to such action by either the Stewart airport commission or the Republic airport commission or both with respect to such service contract as it affects either Stewart airport or Republic airport or both respectively. Until the effective date of any such contract between the metropolitan transportation authority and/or subsidiary corporation of such authority or another entity and the commissioner to provide airport operator services at Stewart and/or Republic airports respectively, the metropolitan transportation authority through its subsidiary metropolitan airports authority

shall continue to provide the service as an airport operator for both Stewart and Republic airports with the costs and expenses of such activities throughout the period of the effective date of this article through the effective date of such contract being the obligation of the metropolitan transportation authority, but not longer than one year from the effective date of this article.

Notwithstanding anything to the contrary contained in this paragraph on or after the effective date of this article, interests in the real property and air transportation facilities at Stewart airport hereinafter set forth shall be leased by the state to the United States government upon terms and consideration and for a term to be mutually agreed upon by the commissioner and said United States government with the concurrence of the chief of staff to the governor for the purpose of establishing an air national guard facility:

(i) For such temporary period or periods as the chief of staff to the governor deems necessary, and for the purposes of an interim air national guard facility, pending construction of a permanent facility—

Building 110, building 112 (Hangar I), building 122 (Hangar E) with adjacent aircraft parking ramp, building 138, building 404, building 502, building 700 with adjacent area for vehicle parking, building 702 with adjacent area for vehicle parking, building 704 with adjacent area for vehicle parking, building 706 with adjacent area for parking, building 2290—Four Bays, building 2306 with adjacent vehicle parking compound. The federal government has appropriated five hundred thousand dollars for rehabilitation

of the said interim air national guard facility. Upon relocation of the air national guard to said permanent facilities all improvements constructed by the federal government shall become the property of the state of New York.

(ii) For a term of fifty years with option for renewal for the purposes of a permanent air national guard facility—

Building 105 with adjacent parking compound located in rear of building, and the land commonly known as the "pad area" situated between runways twenty-seven and thirty-four and the eastern boundary of the airport property, this site being the location upon which a permanent air national guard facility will be constructed.

(i) In connection with any improvements on real property or any new leases or renewal of leases for real property made after the department assumes jurisdiction over an air transportation facility, whether owned by the state or others, that are devoted to non-aviation purposes in whole or substantial portion thereof, the commissioner shall enter into agreements to pay, or make provisions for the payment of, annual sums in lieu of taxes to any municipality or political subdivision of the state in which such improvements are located. Such non-aviation purposes shall include but not be limited to motel, hotel, restaurant, transportation services other than aircraft, manufacturers whose products are not used exclusively at the airport, general office space and such other buildings and improvements as determined by the commissioner to be not exclusively for aviation purposes. In regard to such non-aviation and substantial por-

tion related determinations and any proration of use or purpose for determination of in lieu of tax payments, such determinations shall be in accordance with the recommendations made by the Stewart airport commission or Republic airport commission and the affected municipalities or political subdivisions, respectively.

Notwithstanding the foregoing provisions of this subdivision if an agreement is made between the Stewart airport commission or the Republic airport commission and all municipalities or political subdivisions with respect to payments in lieu of taxes or the definition of "non-aviation purposes" such agreements shall be binding upon the commissioner with respect to such subjects, provided, however, that if there is no such agreement among all the aforementioned parties, the commissioner shall make such determinations based upon the recommendations of all the parties.

4. Once the Stewart airport commission and/or the Republic airport commission have been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in this article with respect to Stewart airport and/or Republic airport only following the consultation, guidance, advice, and assistance of the Stewart airport commission and/or the Republic airport commission, respectively.

5. No toxic waste site or center shall be located or maintained at either Stewart airport including the surrounding area as contained in the metropolitan transportation authority project map number one thousand filed in

the Orange county clerk's office on August thirteenth, nineteen hundred seventy-one or Republic airport.

§ 401. Stewart airport commission. 1. Upon assumption by the department of transportation of jurisdiction over the airport facility and surrounding area located in the county of Orange, known as Stewart airport, there shall thereupon be created a Stewart airport commission. This commission will be an advisory council to the commissioner with respect to administration and management of the Stewart airport facilities and its surrounding areas with respect to projects to be undertaken and operations and management of the facilities at such airport. The commission shall be composed of seven members of which six must be residents of Orange county and one resident from Ulster county. By virtue of their offices, the commissioner of transportation or his designee and the Orange county executive shall be ex officio members of the commission. The members of the commission shall be appointed by the governor with the advice and consent of the senate and, except for the initial appointment terms, shall serve for a term of four years. However, two of the appointments must be from a list submitted by the temporary president and majority leader of the senate, and two must be from a list submitted by the speaker of the assembly. Initial appointments shall be to staggered terms with two of the nominees of the governor being made to initial one-year terms and the other nominee to an initial four-year term, the members nominated by the speaker of the assembly to initial two-year and three-year terms, respectively, and the members nominated by the temporary president and majority leader

of the senate to initial two-year and three-year terms, respectively. If any member shall thereafter no longer meet the residency requirement of his appointment, such position shall be declared vacant. In the event of a vacancy, the vacancy shall be filled in the same manner as the initial appointments except that the term shall be for the unexpired portion of the term of such members. All such members shall be deemed officers of the state in connection with the provisions of section seventeen of the public officers law. The members of the commission shall appoint a chairman from among their number. Each such member, except employees of the state, a political subdivision, or public corporation thereof, shall be entitled to a fee of one hundred fifty dollars per day when actually rendering service as a member, provided that the aggregate of such fees to any one member in any one fiscal year shall not exceed the sum of three thousand dollars. All members shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

2. The Stewart airport commission shall assist in the development of a program relative to the administration and management of the Stewart airport and to advise the commissioner of transportation with regard to such other programs relative to the Stewart airport as he may undertake. Such program shall include, but not be limited to identification of future capital needs, examining the means and methods of financing such future capital needs, the promotion and examination of the financing means and methods for the economic development of the area around the airport, the joining together of such economic develop-

ment and the airport operations, the identification and implementation of ways of working with the local community to accomplish the program and the identification of non-aviation uses and purposes and prorations of use or purposes for determinations of in lieu of tax payments. Once the commission has been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in section four hundred of this article only following the consultation, guidance, advice and assistance of the commission. The Stewart airport commission shall meet at least six times a year at the call of the commissioner of transportation or the chairman of the commission and shall keep a record of all its proceedings and recommendations. Staff services for the commission shall be performed by personnel of the department of transportation. In carrying out the functions and responsibilities of the commissioner and the commission, the commissioner shall designate an executive secretary from among the staff of the department of transportation who will act as the administrative agent of the commission and assist the commission in fulfilling its duties and functions.

§ 402. Republic airport commission. 1. Upon assumption by the department of transportation of jurisdiction over the airport facility and surrounding area located in the county of Suffolk, known as Republic airport, there shall thereupon be created a Republic airport commission. This commission will be an advisory council to the commissioner with respect to administration and management of the Republic airport facilities and its surrounding areas with respect to projects to be undertaken and operations and management of the facilities at such airport. The com-

mission shall be composed of nine members to be appointed by the governor with the advice and consent of the senate and, except for the initial appointment terms, shall serve for a term of four years. By virtue of his office, the commissioner of transportation or his designee shall be an ex officio member of the commission. Four of the members shall be appointed from a list submitted by the temporary president of the senate setting forth the names of six persons who are residents of Nassau or Suffolk county, three persons who are residents of the town of Babylon and three persons who are residents of the Nassau county part of the Farmingdale school district. Two names shall be selected from the first class of residency and one name each shall be selected from the second and third classes of residency. Four of the members shall be appointed from a list sumitted by the speaker of the assembly setting forth the names of six persons who are residents of Nassau or Suffolk county, three persons who are residents of the town of Babylon and three persons who are residents of the Suffolk county part of the Farmingdale school district. Two names shall be selected from the first class of residency and one name each shall be selected from the second and third classes of residency. The ninth member shall be selected by the governor. In any event six members shall be residents of Suffolk county and three members shall be residents of Nassau county. Initial appointments shall be to staggered terms with the nominee of the governor being made to an initial four-year term, with the members nominated by the temporary president of the senate to initial two-year, three-year and four-year terms, respectively, and

the members nominated by the speaker of the assembly to initial one-year, two-year and three-year terms, respectively. If any member shall thereafter no longer meet the residency requirement of his appointment, such position shall be declared vacant. In the event of a vacancy, the vacancy shall be filled in the same manner as the initial appointments except that the term shall be for the unexpired portion of the term of such members. All such members shall be deemed officers of the state in connection with the provisions of section seventeen of the public officers law. The members of the commission shall appoint a chairman from among their number. Each such member, except employees of the state, a political subdivision, or public corporation thereof shall be entitled to a fee of one hundred fifty dollars per day when actually rendering service as a member, provided that the aggregate of such fees to any one member in any one fiscal year shall not exceed the sum of three thousand dollars. All members shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

2. The Republic airport commission shall assist in the development of a program relative to the administration and management of the Republic airport and to advise the commissioner of transportation with regard to such other programs relative to the Republic airport as he may undertake. Such program shall include, but not be limited to identification of future capital needs, examining the means and methods of financing such future capital needs, the promotion and examination of the financing means and

methods for the economic development of the area around the airport, the joining together of such economic development and the airport operations, the identification and implementation of ways of working with the local community to accomplish the program and the identification of non-aviation uses and purposes and prorations of use or purposes for determinations of in lieu of tax payments. Once the commission has been established, the commissioner and/or the department shall effectuate the authorizations, powers and/or duties set forth in section four hundred of this article only following the consultation, guidance, advice and assistance of the commission. The Republic airport commission shall meet at least six times a year at the call of the commissioner of transportation or the chairman of the commission and shall keep a record of all its proceedings and recommendations. Staff services for the commission shall be performed by personnel of the department of transportation. In carrying out the functions and responsibilities of the commissioner and the commission, the commissioner shall designate an executive secretary from among the staff of the department of transportation who will act as the administrative agent of the commission and assist the commission in fulfilling its duties and functions.

3. The arrival or departure of aircraft to or from the airport between the hours of 11 p. m. and 7 a. m., except in the case of emergency, and the development of additional runways at the airport are hereby prohibited, provided, however, that such prohibitions may be altered, modified or changed by resolution adopted by a majority vote of the

members of the commission after giving public notice of such alteration, modification or change and holding a public hearing thereon. Any alteration, modification or change which affects the prohibition with respeect to arrival and departure of aircraft shall be made only after due consideration to the peiod [sic] of daylight occurring at such airport. Notwithstanding the foregoing provisions of this subdivision, the prohibition against the arrival or departure of aircraft to or from the airport between the hours of 11 p. m. and 7 a. m. shall not become effective until ninety days after the effective date of this subdivision.

4. The commission, within one year from its creation, shall conduct a study on payments in lieu of taxes and improvement district taxes and charges with respect to aviation facilities which locate at Republic airport after the effective date of this subdivision and existing aviation facilities whose leases are renewed after the effective date of this subdivision. The commission shall conduct public hearings as part of such study and report its findings and recommendations to the commissioner and the legislature within one year after the commencement of such study of such findings and recommendations. The commissioner, in his discretion, may take such steps as may be necessary to implement any or all of such findings and recommendations.

§ 2. The sum of three million four hundred fifty thousand dollars ($3,450,000), or so much thereof as may be necessary, is hereby appropriated from the state purposes account to be paid as hereinafter provided to the department of transportation for services and expenses, including

those contracted for, of assuming the responsibilities for the program of planning, development, maintenance and operation of Stewart and Republic airports within the amounts appropriated herein. Within the amounts appropriated herein, authorization is granted to the department of transportation to carry out the purposes of this program and further to enter into contracts or agreements for such purposes, including but not limited to contracting with airport operators subject to the approval of the director of the budget; and further to use an appropriate amount of the appropriation for services and expenses connected with administering the transfer and operation of this program; and further to use an appropriate amount of the appropriation not to exceed two hundred fifty thousand dollars for services and expenses connected with administering the transfer and operation of said air national guard units. The moneys hereby appropriated, when made available pursuant to a certificate of approval of availability issued by the director of the budget, shall be paid out of the state treasury on the audit and warrant of the state comptroller on vouchers approved by the commissioner of transportation.

§ 3. The sum of two hundred fifty thousand dollars ($250,000), or so much thereof as may be necessary, is hereby appropriated from the state purposes account to be paid as hereinafter provided to the division of military and naval affairs for services and expenses related to planning, maintenance and operation of facilities of the organized militia occasioned by the move of air national

guard units from Westchester county airport to Stewart airport. With the amounts appropriated herein, authorization is granted to the division of military and naval affairs to carry out the purposes of this program; and further to use an appropriate amount of the appropriation for services and expenses connected with administering transfer and operation of said air national guard units. The moneys hereby appropriated, when made available pursuant to a certificate of approval of availability issued by the director of the budget, shall be paid out of the state treasury on the audit and warrant of the state comptroller on vouchers approved by the chief of staff to the governor.

§ 4. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

§ 5. This act shall take effect immediately.